

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**WILLIAM LUKE OWENS**  
Claimant

VS.

**DILLON COMPANIES, INC.**  
Respondent  
Self-Insured

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Docket No. 231,547

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge Bruce E. Moore on April 3, 2000. The Appeals Board heard oral argument September 8, 2000.

**APPEARANCES**

James B. Zongker of Wichita, Kansas, appeared on behalf of claimant. Scott J. Mann of Hutchinson, Kansas, appeared on behalf of respondent, a qualified self-insured.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The sole issue on appeal is the nature and extent of claimant's disability. The Administrative Law Judge concluded claimant has a 10 percent disability to the body as a whole based on functional impairment. On appeal, respondent contends that claimant's injury warrants only a 5 percent impairment rating under the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. Claimant, on the other hand, asks that the Award for 10 percent be affirmed. Work disability is not at issue.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. The Board finds claimant's injury resulted in a 5 percent permanent partial general disability.

On January 27, 1998, claimant injured his low back lifting a truck door. Two physicians gave impairment ratings for the injury, Dr. John P. Estivo and Dr. Pedro A. Murati. Both

physicians testified their ratings were based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition (*Guides*). Dr. Estivo relied on the DRE model. Dr. Murati used the range of motion model.

Dr. Estivo saw claimant on March 2, 1998, upon referral from Dr. David Richman. Dr. Estivo reviewed MRI and x-ray reports. The MRI showed degenerative changes but no ruptured disc. X-rays revealed normal degenerative changes but no other abnormalities. Claimant's physical exam was normal except for lumbar spasm. Dr. Estivo diagnosed lumbar spine strain and recommended physical therapy.

Dr. Estivo saw claimant again on March 30, 1998. By this time, claimant had completed the physical therapy. The physical exam was essentially the same as it had been on March 2. Dr. Estivo concluded claimant had reached maximum medical improvement and recommended a functional capacity evaluation. The FCE indicated claimant could perform a maximum safe lift of 15 pounds floor to thigh, 40 pounds thigh to shoulder, and 30 pounds shoulder to overhead, with a maximum carry of 50 pounds, 100 feet. Dr. Estivo rated claimant's impairment as 3 percent of the whole body.

Dr. Estivo testified that his 3 percent impairment rating was based on the *AMA Guides*, Fourth Edition. According to Dr. Estivo, the DRE method of rating is to be used if possible and is preferred over the range of motion model for evaluating impairment of the spine. Dr. Estivo referred to Table 72 on page 110, for the descriptions and distinguishing characteristics of the various DRE categories. In Table 72, Category I (0 percent) requires only complaints or symptoms, Category II (5 percent) requires clinical signs but no radiculopathy, and Category III (10 percent) requires evidence of radiculopathy. Dr. Estivo believed claimant's injury fell between DRE Category I (0 percent) and II (5 percent). He further testified that if he had to use one of the DRE categories, he would say claimant fits in Category II.

Dr. Murati saw claimant May 27, 1998. He diagnosed chronic lumbosacral strain. Claimant complained to Dr. Murati of stabbing pain in his back but indicated he had not experienced episodes of shooting pain, numbness, or tingling down either leg. Dr. Murati rated the impairment as 15 percent of the whole person. The rating included 5 percent for lumbosacral strain and an additional 11 percent for loss of range of motion. These combine, using the combined values chart, to arrive at the final rating of 15 percent of the whole person.

The Board agrees with Dr. Estivo's conclusion that the DRE model is preferred in determining spine impairment. Page 112 of the *Guides*, Fourth Edition, states:

The Range of Motion Model should be used only if the Injury Model is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment.

The Board also agrees that claimant's injury fits DRE Category II. Although claimant testified to occasional leg pain, neither physician found radiculopathy. In order to fit into Category III, radiculopathy must be demonstrated.

The Board, therefore, finds that claimant has, and is entitled to benefits based on, a 5 percent permanent partial general disability.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore on April 3, 2000, should be, and the same is hereby, modified.

**WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, William Luke Owens, and against the respondent, Dillon Companies, Inc., a qualified self-insured, for an accidental injury which occurred January 27, 1998 and based upon an average weekly wage of \$1,231.02, for 3.28 weeks of temporary total disability compensation at the rate of \$351 per week or \$1,151.28, followed by 20.75 weeks at the rate of \$351 per week or \$7,283.25 for a 5% permanent partial disability, making a total award of \$8,434.53, all of which is currently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2000.

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BOARD MEMBER

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BOARD MEMBER

### **DISSENT**

I would affirm the Judge's decision. Both doctors rated claimant according to the results of their examinations and according to their interpretation of the *AMA Guides*. Neither

doctor's opinion is more persuasive than the other. Therefore, the Judge was correct in averaging ratings to find that claimant's functional impairment was 10 percent.

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BOARD MEMBER

c: James B. Zongker, Wichita, KS  
Scott J. Mann, Hutchinson, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director